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In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES WILLIS ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. A13-A26) is not yet reported. The panel opinion of the court of appeals (Pet. App. A1-A12) is unreported. The opinion of the district court (Pet. App. A27-A31) is unreported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on March 12, 1980. The pe-

tition for a writ of certiorari was filed on April 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it violated the Fourth Amendment for law-enforcement officers, without a warrant, to remove marijuana that had been discovered and secured by a private party in a storage unit leased to petitioner.

STATEMENT

In an indictment filed in the United States District Court for the Western District of Missouri, petitioner was charged with two counts of possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Pet. App. A13, A29). Thereafter, petitioner moved to suppress the marijuana that was the subject of the indictment. The district court granted the suppression motion (*id.* at A27-A31). A panel of the court of appeals initially reversed the district court's order (*id.* at A1-A12) but, on rehearing en banc (*id.* at A13-A26), the full court affirmed the suppression order in part and reversed and remanded in part.

1. The evidence at the suppression hearing showed that petitioner was the lessee of individual storage bins at two storage facilities, Stor-All of Gladstone, Missouri, and Stor-All of Independence, Missouri

(Tr. 50-51).[1] In the evening of November 29, 1978, managers at each site, while making routine security checks, independently noticed units without locks and with doors ajar (Tr. 6, 17). Each manager called Tom Pepper, the owner of Stor-All's property management company (Tr. 6-7, 17, 22). After contacting a private investigator who was engaged in other investigatory work for the company, Pepper and the investigator went to the Gladstone site and checked the unlocked unit there (Tr. 22). They went inside the unit and found on the floor an open gunny sack that contained what appeared to Pepper to be marijuana (Tr. 23). There was little else, if anything, in the storage unit (*ibid.*).

Pepper and the private investigator then went to the Independence Stor-All, where approximately five open units had been reported by the manager (Tr. 6, 25). Upon inspection, most of these units were seen to contain furniture and other items typically stored in such facilities. However, Pepper and the investigator found that one unit had approximately 20 cardboard boxes stacked nearly to the ceiling (Tr. 25-26), and that this unit had the same distinctive

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[1] At both sites Stor-All rents individual walk-in storage units of several sizes. Petitioner's units were the small five-by-ten size (Tr. 5, 6, 17). Every Stor-All unit has a separate, windowless door (Tr. 14, 19). Lessees provide their own padlocks, which fit into bolts in the doors (Tr. 37-38). Each Stor-All site has more than 500 storage units and is enclosed by a fence with a single gate that is locked at night (Tr. 37). The Stor-All management makes routine security checks of the premises in the morning when the gate is opened and at night when the gate is closed (Tr. 5, 16).

odor they had earlier detected in the unit at the Gladstone Stor-All (Tr. 35). Pepper and the investigator opened the boxes, some of which were not sealed (Tr. 34-35), and found wrapped objects that were shaped like bricks. They opened the wrappings and discovered that the objects were bricks of marijuana (Tr. 25-26).

The police were immediately notified that there had been a break-in and that marijuana had been discovered (Tr. 34). Three local police officers, including two working with a DEA Task Force, arrived at the closed gate to the Independence Stor-All, identified themselves, and were admitted by a uniformed security guard armed with a shotgun (Tr. 43). The guard directed them to the unit in question, where Pepper met them and opened the door of the unit (Tr. 29, 33, 44-45). After viewing the boxes and the unwrapped marijuana, the police summoned a police wagon and removed the boxes containing the marijuana, which was later determined to weigh 938 pounds (Tr. 45-46).

By the time the marijuana from the Independence Stor-All was checked into the police property room, it was approximately 3:00 a.m. on November 30 (Tr. 47). The police sought to proceed immediately to the Gladstone Stor-All, but Pepper, who had gone home (Tr. 27), asked whether he could meet them there first thing in the morning (Tr. 33-34, 47). The police agreed, and they met Pepper outside the Gladstone Stor-All at approximately 7:00 a.m. that morning (Tr. 28, 35). Pepper showed them to the

unit in question, drew back the unlocked bolt, and opened the door (Tr. 36). The police observed the open sack, saw that it contained marijuana, and took it to the DEA office. This marijuana was later found to weigh 54 pounds (Tr. 48).

Subsequently, petitioner was identified as the lessee of the two storage units in which the marijuana was uncovered (Tr. 50-51), and he was indicted on two counts of possession of marijuana with intent to distribute.

2. The district court granted petitioner's motion to suppress the marijuana removed from the two Stor-All units. Although finding that the marijuana had been discovered by a private party, the court held that the removal was a warrantless governmental seizure, that such seizures are per se unreasonable under the Fourth Amendment in the absence of special circumstances, and that no exception to the warrant requirement was applicable in this case (Pet. App. A29-A31).

The government appealed pursuant to 18 U.S.C. 3731. A panel of the court of appeals reversed the district court's order on the ground that the discovery and seizure of the marijuana at both locations had been effected by private persons and that the government's removal of the contraband in such circumstances did not violate the Fourth Amendment (*id.* at A6-A9). Judge Bright dissented on the ground that the removal of the marijuana was a governmental seizure for which the Fourth Amendment required a warrant (*id.* at A9-A12).

On rehearing en banc, the court of appeals affirmed in part and reversed in part. With respect to the marijuana removed from the Independence Stor-All, the court held that, by mounting a guard and continuously monitoring the marijuana up to the moment of turning it over to police, the Stor-All management had effected a private seizure of the drugs (Pet. App. A22). However, the en banc court affirmed the suppression order as to the marijuana from the Gladstone Stor-All on the ground that the management's "simply routine" securing of that site did not amount to a private seizure of the marijuana (*id.* at A21-A22). Judge Bright, joined by two other judges, dissented in part on the ground that the Independence marijuana had been seized by the government without a warrant in violation of the Fourth Amendment (*id.* at A23-A26).

ARGUMENT

1. Review of the instant case by this Court would be premature, since criminal charges are currently pending against petitioner in the district court. The interlocutory ruling of the court of appeals pertains merely to the admissibility of evidence at petitioner's future trial, and thus it places petitioner in the same position he would have occupied if the district court had denied the motion to suppress in the first instance. Such a denial would not have been subject to pretrial appeal. *DiBella* v. *United States*, 369 U.S. 121 (1962). The same considerations that counsel against a defendant's interlocutory appeal of the

denial of his suppression motion weigh against interlocutory review of the present suppression issue by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); see also *American Export Lines, Inc.* v. *Alvez*, No. 79-1 (May 12, 1980), slip op. 3; *id.* at 3, 4-5 (Marshall, J., dissenting). In particular, petitioner may be acquitted at trial, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by seeking review of the final judgment.

2. On the merits, petitioner contends (Pet. 4-6) that the government's warrantless removal of marijuana from the Independence Stor-All was an unreasonable seizure violative of the Fourth Amendment. The en banc court of appeals, agreeing with the panel in this regard, correctly rejected this contention.

There is no dispute in this case that the search leading to the discovery of the marijuana at the Independence Stor-All was a private search conducted by employees of the company in response to apparent break-ins at the facility. The district court (Pet. App. A29), the panel of the court of appeals (*id.* at A6; see also *id.* at A11), and the en banc court of appeals (*id.* at A19) all found that this search was undertaken by private parties without official involvement or instigation, and petitioner does not challenge that determination. See, *e.g.*, *Coolidge* v.

New Hampshire, 403 U.S. 443, 487-490 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).[2]

Accordingly, the sole question presented is whether the officers, called to the Independence facility by Stor-All personnel, were required to obtain a warrant before impounding the marijuana previously discovered and secured by a private party. In our view, the Fourth Amendment imposes no such requirement.[3] First, the officers' removal of the marijuana at the

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[2] For this reason, no issue is presented here concerning either the authority of the Stor-All employees to consent to "a search of any individual leased unit" (Pet. 5) or the propriety of police entry into an area that had not previously been entered and searched by a private party. Therefore, cases such as *Stoner* v. *California*, 376 U.S. 483 (1964); *Chapman* v. *United States*, 365 U.S. 610 (1961); *United States* v. *Jeffers*, 342 U.S. 48 (1951); and *Lustig* v. *United States*, 338 U.S. 74 (1949), which petitioner cites (Pet. 5), are inapposite.

[3] Because a seizure interferes only with a person's proprietory or possessory interest in an object and does not implicate any reasonable expectation of privacy, and because such an interest can be adequately protected by the return of unlawfully seized property (and possibly the award of compensatory damages for any temporary dispossession), we believe that a warrant is not constitutionally required in order to make a governmental seizure based on probable cause. See, *e.g.*, *Payton* v. *New York*, No. 78-5420 (Apr. 15, 1980), slip op. 13-14; *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-352, 354 (1977); *Cardwell* v. *Lewis*, 417 U.S. 583, 591-592 (1974) (plurality opinion); cf. *United States* v. *Watson*, 423 U.S. 411 (1976). This conclusion is especially well-founded where, as here, the seizure involves contraband that cannot be rightfully possessed. However, as discussed below, the decision of the en banc court of appeals in this case is correct even without reference to this broader proposition.

request of Stor-All personnel did not constitute a seizure. "A consensual transfer is by definition not a seizure. * * * If a transfer is voluntary, then it is not a seizure and the Fourth Amendment's reasonableness standard is simply inapplicable." *United States* v. *Sherwin*, 539 F.2d 1, 7-8 (9th Cir. 1976) (en banc). See also *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 487-490. Moreover, "[f]or the purpose of determining if a [governmental] seizure has taken place, * * * only the fact of consent [to the transfer] is relevant, not whether it was properly authorized." *United States* v. *Sherwin*, *supra*, 539 F.2d at 7. Thus, the police properly confiscated the marijuana at the Independence facility.

In any event, even if a governmental seizure did ultimately occur, no warrant was required in light of the fact that the marijuana had already been privately seized. As the en banc court of appeals concluded (Pet. App. A22), a seizure had been fully effectuated by the Stor-All employees prior to the arrival of the police. At that point, any possessory interest petitioner might have had in the marijuana had been eliminated.[4] See *United States* v. *Sanders*, 592 F.2d 788, 792-793 (5th Cir. 1979), cert. granted, Nos. 79-67, 79-148 (argued Feb. 26, 1980); *United*

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[4] We disagree with the conclusion of the en banc court of appeals that the somewhat lesser measures taken at the Gladstone site did not also constitute a private seizure. However, in light of the much greater quantity of marijuana found at the Independence facility (938 pounds) than at the Gladstone facility (54 pounds), we have not sought review of that determination.

States v. *McDaniel*, 574 F.2d 1224 (5th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *United States* v. *Ford*, 525 F.2d 1308 (10th Cir. 1975); *United States* v. *Issod*, 508 F.2d 990, 994 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973); *United States* v. *Blanton*, 479 F.2d 327 (5th Cir. 1973); *United States* v. *Tripp*, 468 F.2d 569 (9th Cir. 1972), cert. denied, 410 U.S. 910 (1973); *United States* v. *Harless*, 464 F.2d 953, 956 (9th Cir. 1972); *United States* v. *Hodges*, 448 F.2d 1309 (6th Cir. 1971); *United States* v. *Winbush*, 428 F.2d 357 (6th Cir.), cert. denied, 400 U.S. 918 (1970); *Wolf Low* v. *United States*, 391 F.2d 61, 63 (9th Cir.), cert. denied, 393 U.S. 849 (1968); see also *Coyle* v. *United States*, cert. denied, No. 79-5677 (Feb. 9, 1980).[5]

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[5] This Court currently has under consideration *Walter* v. *United States*, No. 79-67, and *Sanders* v. *United States*, No. 79-148, in which one of the issues raised involves the status of a private search of packages containing allegedly obscene materials. As in *United States* v. *Kelly*, 529 F.2d 1365 (8th Cir. 1976), which the en banc Eighth Circuit distinguished from the instant case in its opinion below (Pet. App. A7-A8), the private search in *Walter* and *Sanders* involved material arguably subject to First Amendment protection. Moreover, again as in *Kelly*, it was not immediately apparent at the time they were turned over to the government agents that the materials in *Walter* and *Sanders* were subject to seizure; the FBI conducted a subsequent viewing of the films, which petitioners in those cases contend constituted a separate and unlawful "search." While we believe that the private search in *Walter* and *Sanders* did not give rise to a Fourth Amendment violation when the private parties turned over the materials to the FBI, we submit that the nature of the materials and the differing degree of official involvement in the search

In our view, the officers' removal of the marijuana can also be independently justified under the "plain view" doctrine. The en banc court of appeals acknowledged (Pet. App. A5) that the officers had a lawful right to be on the Stor-All premises at the time they first observed the marijuana and that the contraband nature of that substance was immediately apparent to them. However, the court, relying on *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 469-472 (plurality opinion), rejected the government's plain-view argument on the ground that "the officers [did not] observe[] this marijuana inadvertently; they had been called to the scene to look at it, and when they came on the Stor-All premises at Independence and at Gladstone, they knew exactly what they were looking for and what they might reasonably expect to find" (Pet. App. A18).

Whatever the general validity of the *Coolidge* "inadvertency" requirement, however, it has no bearing on the present case. By its terms, the "inadvertency" criterion is designed to prevent law-enforcement authorities from circumventing the Fourth Amendment warrant requirement for searches by contriving a plain-view situation as the basis to locate and seize

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and seizure make it clear, as indicated by the court of appeals' discussion of *Kelly*, that the conduct in this case would not be found unlawful even if the seizure in *Walter* and *Sanders* is invalidated. In addition, as discussed above, no governmental seizure occurred here; and, as discussed below, if a seizure did occur, it was justified under the "plain view" doctrine. Accordingly, it is not necessary for the Court to hold this case pending the decision in *Walter* and *Sanders*.

a given item. Thus, it is directed to the propriety, not of the seizure, but rather of the underlying search. See *Coolidge* v. *New Hampshire, supra*, 403 U.S. at 471 (plurality opinion). Where, as here, there has been no antecedent governmental search, this consideration is simply inapplicable. See 1 W. LaFave, *Search and Seizure* § 2.2, at 242-243 (1978). Moreover, nothing in the plain-view doctrine should prohibit an otherwise valid seizure of contraband, which by definition may not be lawfully possessed, simply because the police had adequate grounds to anticipate the seizure. See *Coolidge* v. *New Hampshire, supra*, 403 U.S. at 471, 472 (plurality opinion). Accordingly, since the officers in this case were on the Stor-All premises at the invitation of company employees and observed a substance that they recognized to be marijuana, they properly made a warrantless seizure of the contraband in plain view.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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